STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 7, 2002
V	No. 225649 Emmet Circuit Court
ROBERT SCOTT LaROSE, Defendant-Appellant.	LC No. 99-001548-FH

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of malicious destruction of police property, MCL 750.377b; resisting and obstructing a police officer, MCL 750.479-b; and allowing an intoxicated person to operate his motor vehicle, MCL 257.625(2). Defendant was sentenced to concurrent terms of one year in jail for malicious destruction of police property, eleven months in jail for resisting and obstructing a police officer, and thirty days in jail for allowing an intoxicated person to operate his motor vehicle. Defendant appeals by right. We affirm in part, and reverse in part.

On the night of his arrest, defendant and one of his friends, Dennis Rushing, patronized a local bar for about one and one-half hours. Both defendant and Rushing testified that Rushing was the designated driver for the evening and that Rushing operated defendant's vehicle after they left the bar. A short time after leaving the bar, defendant's vehicle was stopped by officers Michael Keiser and Keith Jenkins of the Emmet County Sheriff's Department because of a defective taillight,[1]. According to Officer Keiser, Rushing pulled the vehicle to the side of the road in a normal manner, and the officer reviewed his driver's license and the vehicle's proof of insurance. While doing so, Officer Keiser smelled a strong alcohol odor emanating from Rushing and saw that his eyes were watery and bloodshot. Rushing admitted that he had consumed two alcoholic beverages before operating defendant's motor vehicle. Officer Keiser then administered various field sobriety tests to the driver; however, he successfully passed all the sobriety tests. Nevertheless, because Rushing "swayed a little on the balance tests," his speech was slurred, and the preliminary breath test (PBT) confirmed the presence of alcohol, he was placed under arrest for OUIL, MCL 257.625(1).

[1] MCL 257.683; MCL 257.686

Because defendant admitted that he had been drinking with Rushing and was the owner of the vehicle, defendant was arrested for allowing an intoxicated person to operate a motor vehicle, MCL 257.625(2). A search incident to arrest revealed two open bottles of liquor. In addition, at trial, it was established that during the sobriety tests of Rushing, defendant got out of his vehicle twice, had to be ordered back into the vehicle both times, and that while Officer Keiser was placing Rushing in the patrol car, defendant again got out of his vehicle and confronted Officer Jenkins.

It is undisputed that while being transported to the Petoskey jail, about forty minutes from the scene of the arrest, defendant constantly yelled that he could not breathe, was claustrophobic, and asked that the patrol car be stopped so that he could "kick [Officer Keiser's] butt." It is also undisputed that after the officers refused to stop the patrol car, defendant began kicking at the driver's side rear door and window, causing so much damage that Officer Jenkins could not open the driver's side door. As a result of defendant's actions, the officers called for backup, stopped the patrol car, and restrained defendant on the ground until backup arrived. At that point, the officers noticed a small fire under the passenger side of the front seat, prompting Rushing's removal from the patrol car so the patrol car could be searched. The search revealed that two electrical wires had been pulled out of the battery charger located under the passenger seat, and that the rear driver's side door frame was bent and the top of the door was bent out approximately five to six inches. Rushing denied pulling out the electrical wires, and also testified that he had not seen defendant pull any wires out of the charger. The parties stipulated that the damage to the patrol car was in excess of $1,000.

I

Defendant first argues that the evidence was insufficient to support his conviction for knowingly permitting another person to operate his motor vehicle on the highway when that other person was visibly impaired or under the influence of an intoxicating liquor. We agree. In reviewing insufficiency of the evidence claims, we review the evidence presented at trial in the light most favorable to the prosecution in order to determine whether a rational trier of fact could find that all the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Taylor*, 245 Mich App 293, 296; 628 NW2d 55 (2001).

MCL 257.625(2) provides:

> The owner of a vehicle or a person in charge or in control of a vehicle shall not authorize or knowingly permit the vehicle to be operated . . . by a person who is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxication liquor and a controlled substance, who has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or whose ability to operate the motor vehicle is visibly impaired due to the consumption of intoxicating liquor, a controlled substance, or a combination of intoxication liquor and a controlled substance.

The prosecution asserts that the following evidence was sufficient evidence to prove that the driver was under the influence of an intoxicating liquor: (1) the officer has made numerous drunk driving arrests in his five and one-half years experience, (2) the officer smelled a strong odor of

alcohol coming from the driver, (3) his eyes were bloodshot and watery and he admitted that he drank two alcoholic drinks; (4) his speech was slurred and he swayed and stumbled during his interaction with the officer, (5) a PBT registered alcohol on his breath; and (6) the officer found two bottles of liquor in defendant's vehicle.

However, because the evidence relied on by the prosecution does not support a finding that defendant knew that Rushing was intoxicated when he permitted him to drive the vehicle, there is insufficient evidence to prove beyond a reasonable doubt that defendant knowingly permitted an intoxicated individual to operate his vehicle. A person is guilty of operating a motor vehicle while "under the influence of an intoxicating liquor" if he operates the motor vehicle while his ability to drive is "substantially and materially affected" by the consumption of intoxicating liquor. *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999), citing *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975). According to defendant, Rushing was talking fine, walking normally, and did not appear intoxicated to him after they left the bar. More importantly, Rushing's driving was not erratic, and he passed the sobriety tests given by Officer Keiser. Thus, there was no evidence that defendant knew that Rushing's ability to operate his motor vehicle was "substantially and materially affected."

Defendant also could have been convicted if he knew that Rushing's "ability to operate the motor vehicle [was] visibly impaired due to the consumption of intoxicating liquor . . ." MCL 257.265(2). A person is "visibly impaired" when his ability to drive is so weakened or reduced by consumption of an intoxicating liquor that he drove with less ability than would an ordinary, careful, and prudent driver. *People v Calvin*, 216 Mich App 403, 407; 548 NW2d 720 (1996); *Oxendine*, *supra* at 354. Nonetheless, MCL 257.625(2) requires the owner of the vehicle to have *knowingly permitted* their motor vehicle to be operated by a driver whose ability to operate was visibly impaired. As previously discussed, there was no evidence that defendant knew that Rushing's ability to operate the motor vehicle was visibly impaired. Indeed, the evidence indicates that Rushing did not drive in an erratic manner, and that he passed the sobriety tests. Thus, the prosecution failed to present any evidence indicating that defendant was aware that Rushing's ability to operate the motor vehicle was visibly impaired. Viewing the evidence in a light most favorable to the prosecution, then, we conclude that the evidence was insufficient to prove that defendant knew that Rushing was under the influence of an intoxicating liquor or was visibly impaired due to the consumption of an intoxicating liquor. As such, we reverse defendant's conviction and sentence on this charge.

II

Defendant next argues that there was insufficient evidence to support his misdemeanor arrest as lawful. We disagree.

A police officer may make a warrantless misdemeanor arrest if the misdemeanor is committed in the officer's presence, MCL 764.15(1)(a); *People v Wood*, 450 Mich 399, 403; 538 NW2d 351 (1995); *People v Lyon*, 227 Mich App 599, 604; 577 NW2d 124 (1998), or if the officer has reasonable cause to believe both that a misdemeanor punishable by imprisonment for more than 92 days has been committed, and that the person arrested committed the misdemeanor. MCL 764.15(1)(d). In the instant case, our review of the evidence persuades us that defendant's misdemeanor arrest for allowing an intoxicated person to operate his motor vehicle was lawful.

Officer Keiser testified that although Rushing passed the field sobriety tests, he also slurred his speech during the tests and swayed on his feet. Before placing defendant under arrest for the misdemeanor crime of knowingly permitting a person under the influence of alcohol to operate a motor vehicle on the highway, Officer Keiser confirmed that defendant owned the motor vehicle and had been drinking with Rushing at a local bar. Based on all of this information, Officer Keiser had probable cause to believe that defendant had committed a misdemeanor in the officer's presence. Even if Officer Keiser lacked probable cause to believe that a misdemeanor was being committed in his presence, based on his investigation at the scene, Officer Keiser had reasonable cause to believe that Rushing had operated defendant's motor vehicle with defendant's permission, that he did so while he was under the influence of alcohol, and that defendant was aware that Rushing was under the influence of alcohol when he permitted him to drive the vehicle. Thus, Officer Keiser had an alternative basis supporting his warrantless arrest of defendant.

III

Defendant next argues that the trial court erred in instructing the jury on "an essential element of an offense." Specifically, defendant asserts that the trial court should have instructed the jury that a lawful warrantless misdemeanor arrest requires the arresting officer to have a probable cause belief that the misdemeanor crime had been committed in the officer's presence. Defendant failed to preserve this issue for appeal because he did not request or object to the specific instruction given or omitted. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 657; 620 NW2d 19 (2000). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

As we discussed above, defendant was charged with a misdemeanor crime carrying a maximum sentence of 93 days' imprisonment. MCL 257.625(9)(a). A police officer may arrest a person without a warrant if the officer has reasonable cause to believe that a misdemeanor punishable by imprisonment for more than 92 days has been committed, and that the person being arrested committed the misdemeanor. MCL 764.15(1)(d). Because Officer Fleming had reasonable cause to believe that defendant had committed a misdemeanor punishable by imprisonment for more than 92 days, the trial court's instructions in this regard were appropriate and defendant cannot show plain error.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski